

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BWI TAXI MANAGEMENT, INC.)	
)	
Employer)	Case No. 5-RC-16489
)	
and)	
)	
EVENING SHIFT CAB OPERATORS)	
ASSOCIATION)	
)	
Petitioner)	

**BWI TAXI MANAGEMENT, INC.'S REQUEST FOR REVIEW OF THE
ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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**BWI TAXI MANAGEMENT, INC.'S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

BWI Taxi Management, Inc. (“BWITM”), submits this Request for Review of the Acting Regional Director’s Decision and Direction of Election pursuant to Section 102.67 of the National Labor Relations Board’s (“NLRB” or “the Board”) Rules and Regulations. BWITM submits that review of the Acting Regional Director’s September 16, 2010 Decision and Direction of Election (“Decision”) is appropriate on the following grounds: (1) the Acting Regional Director’s Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of BWITM; and (2) substantial questions of law and policy are raised because of the Acting Regional Director’s departure from Board precedent.

I. STATEMENT OF THE CASE

A. The Petition.

On August 4, 2010, the Petitioner, Evening Shift Cab Operators Association (“ESCOA” or “Petitioner”), filed a Petition seeking to represent “[a]ll full time and part time taxi cab drivers who are authorized by the Employer through a government contract to exclusively operate and provide taxi cab services at BWI Airport using either their own cab or one provided by the Employer.”

B. The Hearing.

A hearing was held on August 20, 2010 before Hearing Officer Patrick J. Cullen.¹ Saeid Esfarjani (“Mr. Esfarjani”), co-owner of BWI Taxi Management, Inc. (“BWITM”), testified at

¹ Throughout the remainder of this Request for Review, all citations to the transcript of the August 20, 2010 hearing will be referred to as “Tr.” followed by the appropriate page number. BWITM’s exhibits will be referred to as “BWITM ex.” followed by the appropriate number.

the hearing on behalf of BWITM. Samson Yemenu (“Mr. Yemenu”), a taxicab driver and self-described President of ESCOA, testified on behalf of Petitioner.

C. BWITM’s Position.

At the hearing, BWITM contended that its taxicab drivers are independent contractors and not employees of BWITM and, therefore, the NLRA is inapplicable. Thus, BWITM’s position was that the Petition should be dismissed.

D. The Acting Regional Director’s Decision.

Pursuant to Section 3(b) of the National Labor Relations Act, as amended (“the Act” or “NLRA”), Stephen M. Glasser, Acting Regional Director for Region 5, issued a Decision and Direction of Election on September 16, 2010. The Acting Regional Director found that the petitioned-for unit is an appropriate unit.

II. STATEMENT OF THE ISSUES

I. Whether the Acting Regional Director’s Decision that the taxicab drivers (owner-operators and lease drivers) operating at BWI Airport pursuant to BWITM’s exclusive concession contract with the Maryland Aviation Administration are employees of BWITM rather than independent contractors is clearly erroneous based upon the facts presented at the representation hearing.

II. Whether the Acting Regional Director’s Decision that the taxicab drivers (owner-operators and lease drivers) are employees of BWITM rather than independent contractors is contrary to established Board precedent, requiring that the Decision be reversed.

The brief will refer to Petitioner’s exhibits as “Petitioner ex.” followed by the appropriate number.

III. OVERVIEW OF APPLICABLE BOARD LAW²

The issue in this case is whether BWITM's taxicab drivers are to be considered independent contractors or employees under the NLRA.³ In defining "employees," Section 2(3) of the NLRA specifically excludes "independent contractors" from coverage under the Act. *See* 29 U.S.C. § 152(3). Whether an individual is classified as an independent contractor or an employee under the NLRA is to be determined by the application of common law agency principles. *See NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968) (observing that "there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor" for the purposes of deciding coverage under the NLRA.)

Issues involving whether taxicab drivers are independent contractors or employees under the NLRA previously have been the subject of Board decisions. As explained in *AAA Cab Services, Inc.*, 341 NLRB 462 (2004), in regard to common-law agency principles:

In the context of the taxicab industry, the Board has given significant weight to two factors: "the lack of any relationship between the company's compensation and the amount of fares collected," and "the company's lack of control over the manner and means by which the drivers conducted business after leaving the [company's] garage."

Id. at 465 (citations omitted).

As to the first factor identified in *AAA Cab Services*, that concerning "the lack of any relationship between the company's compensation and the amount of fares collected," the Board

² Board decisions and relevant caselaw are discussed more fully in Section V, *infra*.

³ As explained, *infra*, in June 2010 the Region dismissed an unfair labor practice charge brought by one of BWITM's taxicab drivers, finding that BWITM's taxicab drivers were independent contractors and not employees based on Board precedent involving taxicab drivers.

time and again has observed that the establishment of a flat “stand fee” that is paid weekly by taxicab drivers to a taxicab company is not indicative of an employer-employee relationship. Indeed, the Board has held that when a taxicab driver pays to the taxicab company a fixed stand fee and retains all the fares he or she collects without accounting for those fares, there is a “*strong inference*” that the taxicab company does not exert control over the means and manner of the taxicab driver’s performance. *See City Cab Company of Orlando, Inc.*, 285 NLRB 1191, 1194 (1987); *see also Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 879 (D.C. Cir. 1978) (observing that “[t]he surrender of the right to make the drivers account for their earnings causes a *fundamental change* in the relationship between the companies and their drivers which will *usually remove the latter from the category of ‘employees’*”) (emphasis added).

As to the second factor identified in *AAA Cab Services*, that concerning “the company’s lack of control over the manner and means by which the drivers conducted business after leaving the [company’s] garage,” contrary to the Acting Regional Director’s Decision, the record establishes that virtually every aspect of the “manner and means” of the taxicab drivers’ performance of taxicab services at BWI is controlled by or stems from the explicit provisions of the contract BWITM entered into with the Maryland Aviation Administration (“MAA”), an agency of the State of Maryland, which is further explained below. In addition, the conduct of taxicab drivers also is substantially regulated by Article 11, Title 15 of the Anne Arundel County Code. Most, if not all, of the rules that BWITM’s taxicab drivers have to abide by in order to provide taxicab services at BWITM are required by law, regulation, or by the MAA’s contract with BWITM, and thus do not evince substantial control over the manner and means of the taxicab drivers’ performance by BWITM. *See Elite Limousine Plus*, 324 NLRB 992, 1002 (1997) (observing that “[t]he Board has [] held that requirements imposed by government

regulations do not constitute control by an employer, but is control by the governing body”); *see also Air Transit, Inc.*, 271 NLRB 1108, 1111 (1984) (Board finding that taxicab company that contracted with government to provide taxicab services at Dulles International Airport was not an employer of taxicab drivers under the NLRA, and observing, in the context of analysis into the company’s control over the taxicab drivers, that “[n]early all of the factors allegedly demonstrating control over the manner and means of the drivers’ performance of their duties stem from the requirements imposed by the FAA contract . . . and thus do not constitute evidence of employer control”) (emphasis added). The Acting Regional Director’s results-oriented Decision to the contrary is clearly erroneous based upon the facts presented at the representation hearing and runs afoul of both established Board precedent and long-standing case law concerning issues of independent contractor status of taxicab drivers under the NLRA.

IV. FACTUAL BACKGROUND

A. BWITM Has A Contract With The Maryland Aviation Administration To Provide For Exclusive Taxicab Operations At BWI Airport.

BWITM is a corporation incorporated in the State of Maryland and has had a long-standing contract with the Maryland Aviation Administration (“MAA”)⁴ to provide exclusive taxicab service to customers traveling from Baltimore/Washington International (BWI) Thurgood Marshall Airport. (Tr. 10, 13-14; *see also* BWITM ex. 1.) The present contract between BWITM and the MAA (the “MAA Contract”) was entered into in 2003 and is continuing under an extension through the spring of 2011. (Tr. 14; *see also* BWITM ex. 1; Petitioner ex. 1.)

⁴ BWI, which is Maryland’s major air carrier facility, is operated by the MAA. The MAA is an agency of the State of Maryland’s Department of Transportation.

The MAA Contract requires BWITM to provide to BWI's airport passengers "twenty-four (24) hours a day, seven (7) days a week, a high quality taxicab service adequate to meet the requirements of all deplaning airline passengers and their accompanying baggage." (BWITM ex. 1, p. 1.) Despite the Acting Regional Director's assertion to the contrary, virtually all of the methods and means of BWITM's operation at BWI are strictly controlled by the language of the MAA Contract. Indeed, the MAA Contract explicitly states that BWITM is "obligated to operate and manage a Taxicab Concession at the Airport as set forth herein. This Concession must be operated and managed in a manner that will provide, and meet the requirements, established by the Administration" (BWITM ex. 1, p. 2.) *See also* CODE OF MARYLAND REGULATIONS (COMAR) 11.03.01.11.B ("Airport taxicabs. Airport taxicabs shall operate in compliance with all provisions of the concession contract awarded by the Administration.")

As the MAA Contract makes clear, any failure by BWITM to "strictly enforce" the requirements of the MAA Contract with its taxicab drivers "may be considered a default by the Contractor and grounds for termination" of the MAA Contract. (BWITM ex. 1, p. 3.) BWITM also is subject to hefty fines for incidents in which its taxicab drivers violate provisions in the MAA Contract. (BWITM ex. 1, pp. 38-39.)

BWITM does have roughly twenty-five (25) employees to help it operate its business pursuant to its taxicab concession contract with the MAA. (Tr. 10.) These employees include taxicab dispatchers, dispatcher supervisors, office workers, an office manager, and a cashier. (Tr. 10, 18, 21.)⁵ Petitioner is not seeking to represent these employees.

⁵ BWITM's taxicab dispatchers and dispatcher supervisors earn an hourly wage and overtime. (Tr. 18, 21.) Unlike BWITM's taxicab drivers, who may work as much or as little as they want during their assigned 15-hour shift window (Tr. 15-16, 84), both dispatchers and dispatcher

B. In Order To Fulfill Its Obligations Under The MAA Contract, BWITM Has Contracts With Lease Drivers And Owner-Operator Drivers.

Under the MAA Contract, BWITM is contractually obligated to provide for an adequate number of taxicabs to provide taxicab services to persons leaving BWI. In doing so, the MAA Contract allows BWITM to “obtain taxicabs either by lease, purchase, or subcontract arrangements with taxicab driver owner/operators, or a combination of lease, purchase, or subcontract.” (BWITM ex. 1, p. 5.) At present, BWITM provides for 324 taxicabs at BWI, with 43 of the taxicabs being operated by “lease drivers,”⁶ 261 of the taxicabs being operated by “owner/operator drivers,” and the remaining 20 taxicabs being operated by “second drivers.” (Tr. 23.) Each type of driver shall be discussed in turn.

1. Lease Drivers

Put simply, each lease driver operates one of the 43 taxicabs owned by BWITM. Of course, each lease driver must be licensed to drive a taxicab pursuant to the Anne Arundel County Code.⁷ Each lease driver enters into a “Lease Driver Contract” with BWITM that

supervisors are required to work eight-hour shifts. (*Id.*) They never operate a taxicab at BWI. (Tr. 22.)

⁶ During the hearing, Petitioner focused on the fact that BWITM has chosen to utilize 43 lease taxicabs in order to provide taxicab services at BWI, appearing to insinuate that this is somehow evidence of control. (Tr. 60.) It is not. As Mr. Esfarjani explained, the MAA Contract allows for BWITM to utilize anywhere from none to all leased taxicabs (*Id.*), and the number of leased taxicabs utilized by BWITM is merely based on the amount of income BWITM needs to pay to the MAA under the contract. (Tr. 65.) Thus, it is hard to discern Petitioner’s point here.

⁷ During the hearing, Petitioner’s witness, Mr. Yemenu, claimed that BWITM does not allow taxicab drivers to transfer their licenses to others, asserting that this went against the Anne Arundel County Code, which he claimed provides that taxicab operators “have the right to transfer his license to anybody he choose to.” (Tr. 166-170.) Mr. Yemenu is incorrect. Such a provision appears nowhere in the provisions in the Anne Arundel County Code regarding the licensing of taxicab operators. *See* ANNE ARUNDEL COUNTY CODE, § 11-15-201 – 204. Indeed, the County code makes clear that taxicab operator licenses are individually issued by the County

permits the lease driver to operate his or her leased taxicab at BWI pursuant to the MAA Contract.⁸ (BWITM ex. 2.) The Lease Driver Contract provides that the lease driver is “self employed [and] responsible for all records of income and taxes.” (BWITM ex. 2, pp. 1, 8.) BWITM does not pay any wages to lease drivers. (Tr. 23-24.) To the contrary, each week the lease driver pays to BWITM what is known in the taxicab industry as a “stand fee,” which is presently \$527.00 per week. (Tr. 24.) This stand fee is a flat fee and is the same for all lease drivers and has *absolutely no correlation* with the fares that the lease driver collects weekly, if any. (Tr. 24-25.) Indeed, the lease driver does not have to account in any way to BWITM the amount of fares he or she collects in providing taxicab services. (Tr. 24-25, 117.) The payment of the weekly stand fee is for the privilege of operating the leased taxicab at BWI for up to 12 hours per day, the hourly limit set by the Anne Arundel County Code. (Tr. 96; *see also* ANNE ARUNDEL COUNTY CODE, § 11-15-303.) So long as their weekly stand fee is paid lease drivers can choose to work no hours or up to 12 hours per day. (Tr. 15-16, 112.)

2. Owner-Operator Drivers

Owner-operators own their own taxicabs and contract with BWITM to operate their taxicabs at BWI. (BWITM ex. 3.) BWITM’s contracts with owner-operators explicitly state that

to each individual taxicab operator who meets certain qualifications. *Id.* at § 11-15-203. Further, the County code states that “[a] taxicab operator may not . . . permit another person to use the taxicab operator’s license.” *Id.* at § 11-15-303(c)(1). Thus, Mr. Yemenu’s point here is unclear. What is clear is that Mr. Yemenu described himself as “President” of Petitioner (Tr. 162), and that Petitioner has competed with BWITM in bidding for the concession contract with the MAA (Tr. 168), thus establishing a clear bias in Mr. Yemenu’s testimony likely leading him to make disingenuous statements during the hearing such as that described above.

⁸ Pursuant to the Anne Arundel County Code, “[a] taxicab operator shall . . . operate only for the owner designated on the operator’s license unless the Department provides written permission for the operator to operate for another owner.” ANNE ARUNDEL COUNTY CODE, § 11-15-201(b)(2). Thus, BWITM’s lease drivers are prohibited by County code from using their leased taxicabs to operate for another owner.

the “Operator is an independent contractor” and is responsible for his or her own taxes.⁹ (BWITM ex. 3, p. 4.) The MAA Contract establishes the stand fee for owner-operators. (BWITM ex. 1, p. 12.) The stand fee for owner-operators presently is \$169.00 per week and can only be adjusted by the MAA. (Tr. 24, 56.) The stand fee is paid for the “privilege of operating a taxicab” at BWI pursuant to BWITM’s contract with the MAA. (BWITM ex. 3, p. 3.) So long as their weekly stand fee is paid owner-operators can choose to work as a taxicab operator at BWI for no hours or up to 12 hours per day. (Tr. 15-16, 112.) The stand fee is the same for all owner-operators and has *absolutely no correlation* with the fares that the owner-operator collects weekly, if any. (Tr. 24-25.) Indeed, the owner-operator does not have to account in any way to BWITM the amount of fares he or she collects in providing taxicab services. (Tr. 24-25, 117.) Owner-operators also are “solely responsible for upkeep and all maintenance required to maintain [their] vehicles in a safe and proper operating condition.” (BWITM ex. 3, p. 5.)

3. Second Drivers¹⁰

Second drivers are those drivers who enter into agreements, basically subleases, directly with owner-operators to operate the owner-operator’s taxicabs. (Tr. 23.) Such contracts with

⁹ BWITM also does not provide for any workers’ compensation benefits for any of its taxicab drivers. (Tr. 68-69.) At the hearing, Petitioner tried to make an issue out of the fact that a taxicab driver had filed for workers’ compensation. (Tr. 142-143.) Petitioner’s emphasis on a workers’ compensation claim is misplaced, however, as the determination is being appealed and the testimony itself regarding the claim is unclear, with Petitioner mentioning an incident involving a stabbing and Mr. Esfarjani only recalling an incident where a taxicab driver injured his finger. (*Id.*) The testimony further established that BWITM maintains liability insurance for accidents to drivers. (Tr. 70, 143.)

¹⁰ Although both BWITM and the Petitioner stipulated prior to the start of the August 20, 2010 hearing that Petitioner was not seeking to represent second drivers in its certification petition, BWITM believes it helpful to explain all three categories of drivers performing taxicab services at BWI under BWITM’s contract with the MAA.

second drivers are subject to approval by BWITM.¹¹ The major difference that occurs when an owner-operator contracts with a second driver is that the weekly stand fee charged to an owner-operator for the privilege of operating his or her taxicab at BWI increases by \$100.00, from \$169.00 per week to \$269.00 per week. (Tr. 24, 57-58.) The increased stand fee remains the obligation of the owner-operator. (Tr. 58, 139.)¹² Owner-operators are free to come to any arrangement with a second driver as to what the second driver will pay to the owner-operator to operate the owner-operator's taxicab. (Tr. 61.) BWITM has no interest in reviewing any such arrangement between an owner-operator and a second driver. (Tr. 140.) In the case of second drivers, just as with the lease drivers and owner-operators, BWITM does not receive any share or percentage of any fares received by any of the second drivers in performance of their taxicab services. (Tr. 24-25.)

C. In Order To Fulfill Its Obligations Under The MAA Contract, BWITM Has Established A Two-Shift System Of Operation, With Its Taxicabs Being Dispatched From A "Staging" or "Holding" Area.

BWITM does not provide its taxicab drivers with an office or work location. Instead, taxicab drivers' actual work location is at a designated BWI terminal where the taxicab drivers pick up their customers. Under its contract with BWITM, the MAA provides land to BWITM. (BWITM ex. 1, pp. 13-14.) This land is the property of the State of Maryland and is used to provide a taxicab "staging" or "holding" area, *i.e.*, a parking lot utilized by the taxicab drivers

¹¹ BWITM has never rejected an owner-operator's request to utilize a second driver. (Tr. 119.)

¹² The testimony at the hearing is uncontradicted that the receipts for the payment of the stand fee, regardless of who physically hands the payment to BWITM, reflect the name of the owner-operator. (Tr. 194.) BWITM is not privy to any arrangements between the owner-operator and the second driver as to the payment of the stand fee. As far as BWITM is concerned the stand fee is owed by the owner-operator and such is reflected in the receipt issued for the payment of the stand fee.

while they are waiting to be dispatched to the terminal to pick up customers. (Tr. 14.) Otherwise, the taxicabs operating at BWI almost certainly would block traffic at the terminal and create hazardous conditions for pedestrians and other vehicles. BWITM dispatches its affiliated taxicabs from this staging area to the terminal where the taxicab driver picks up his or her customer. (Tr. 14, 20.) BWITM's taxicab drivers are permitted to cultivate their own client base, so that if a passenger makes a request to a dispatcher that a certain taxicab driver drive the passenger to his or her destination, that particular driver will be called from the holding area to pick up the passenger (assuming the taxicab driver is at BWI at the time). (Tr. 146-48.)¹³ BWITM's taxicab drivers are also free to transport a passenger for free or to extend credit to a passenger if the taxicab driver so chooses. (Tr. 120.)

In accordance with its obligation to provide prompt and efficient taxicab service under the MAA Contract, BWITM has established two shifts for its taxicab drivers to operate. (Tr. 15.) BWITM's use of this two-shift system ensures that it is able to provide efficient taxicab service for BWI's customers "twenty-four (24) hours a day, seven (7) days a week," as is required by the MAA Contract.¹⁴ (Tr. 80-81; BWITM ex. 1, p. 1.) The "morning shift" begins at 4 p.m. and

¹³ Cf. *Friendly Cab Co.*, 341 NLRB 722 (NLRB 2004) (finding employee status of taxicab drivers where, among other things, "drivers may not provide individual business cards or phone numbers to customers or develop their own independent relationship with individuals . . .").

¹⁴ Petitioner's witness, Mr. Yemenu, agreed that BWITM had to provide for an "orderly operation" at BWI pursuant to the MAA Contract, but then actually tried to argue that a system whereby all 324 of BWITM's taxicabs would be at BWI at the same time would not cause any problem with the movement of traffic through BWI and would not impede BWITM's obligation to the MAA to provide for prompt and efficient taxicab service at the airport. (Tr. 176-77.) Mr. Yemenu then stated that the airport taxicab companies at Dulles International Airport and Reagan International Airport do not have their drivers work in shifts, but he then admitted that he never actually worked at either of those airports (Tr. 178), that the physical layouts of those airports were not the same as that of BWI (Tr. 180), and that the holding area provided to BWITM by the MAA only "allows for a certain amount of cars to be lined up," (Tr. 182), thus

ends at 7 p.m.¹⁵ (Tr. 15.) Thus, any driver assigned to the morning shift may work as a taxicab driver for up to 12 hours in that 15-hour shift window. (Tr. 15.) The 12-hour limitation on taxicab driving is mandated by the Anne Arundel County Code. *See* ANNE ARUNDEL COUNTY CODE, § 11-15-303 (stating that “[a]n owner may not permit a taxicab to be operated by the same taxicab operator for more than a total of 12 hours in a 24-hour period,” and that “[a] taxicab operator may not . . . operate a taxicab for more than a total of 12 hours in a 24-hour period.”) The “evening shift” begins at 4 p.m. and ends at 7 a.m. (Tr. 15.) Just as with the taxicab drivers on the morning shift, taxicab drivers assigned to the evening shift may work for up to 12 hours in that 15-hour shift window. (Tr. 15.) BWITM’s taxicab drivers can work as much or as little as they want during their assigned 15-hour shift window. (Tr. 15-16, 84.) In other words, the taxicab drivers have full discretion to pick their hours. As explained, the only prohibition is that they may not work more than 12 hours in any 24-hour period, a prohibition imposed by the Anne Arundel County Code.

D. The MAA Contract Controls Virtually All Aspects Of Taxicab Drivers’ Performance At BWI.

Although BWITM has contracted with the MAA to operate and provide for exclusive taxicab services at BWI, virtually all of the manner and means of performance of BWITM’s taxicab drivers is controlled by the explicit provisions found in the MAA Contract, with very little discretion, if any, being left to BWITM in the way its drivers perform their taxicab

undercutting any claim by Mr. Yemenu that all of BWITM’s taxicabs could work at BWI at the same time.

¹⁵ The start and end times of each shift varies slightly on Sundays, but each shift remains 15 hours. (Tr. 15.)

services.¹⁶ Indeed, the MAA Contract requires BWITM to “[a]bide by all rules, regulations and directives of the Administration and other governmental agencies in the conduct of its business at the Airport and ensure adherence to the Administration’s rules, regulations and directives by its employees and those having subcontract agreements” with BWITM. (BWITM ex. 1, p. 9.) While BWITM will not in this Request for Review go into every single aspect controlled by the MAA Contract, as the MAA Contract itself was provided as an exhibit at the hearing and speaks for itself, what follows are some of the more noteworthy examples of MAA (and therefore not BWITM) control.¹⁷

1. Control by the MAA – Incoming and Outgoing Fares

The MAA Contract explicitly limits the types of trips that BWITM’s taxicabs can make. For instance, in regard to inbound trips, *i.e.*, passengers being brought to BWI, the MAA Contract demands that:

BWI Taxis are only allowed to provide inbound service to BWI Airport upon request only from (1) BWI Rail Station; (2) Benson Hammond House and other

¹⁶ Although BWITM does not provide its taxicab drivers with copies of the MAA Contract, the drivers are informed of the requirements of the MAA Contract by the various provisions found in their own contracts with BWITM. (Tr. 146.)

¹⁷ There are also instances where the manner and means of performance of BWITM’s taxicab drivers is controlled not only by the language of the MAA Contract, but also by Article 11, Title 15 of the Anne Arundel County Code, which regulates taxicabs in the County. For example, the Anne Arundel County Code establishes certain “duties” for taxicab drivers. ANNE ARUNDEL COUNTY CODE, § 11-15-303. For example, taxicab drivers are prohibited from smoking “without the passenger’s consent,” using “abusive, indecent, or offensive language,” refusing “service in order to group passengers more profitably,” and operating “a taxicab recklessly, in an unsafe manner, or in disregard of the public general or local laws of this State governing the operation of motor vehicles.” *Id.* Because the Anne Arundel County Code obviously controls significant aspects of the manner and means of a taxicab driver’s performance, it also should be considered in any analysis by the Board. *See also* COMAR 11.03.01.11.A(1) (“When at the Airport, both Airport and non-Airport taxicab drivers shall conform to all laws, ordinances, rules, and regulations of their respective jurisdictions, as well as those of the Administration and the State.”)

on-Airport locations; (3) hotels in the immediate Airport area as determined by the Administration; and (4) locations within Anne Arundel County to which a passenger was transported from BWI Airport and a request to wait for an immediate return trip has been made by the passenger.

(BWITM ex. 1, p. 3; *see also* Tr. 25.)¹⁸ As to outbound fares leaving BWI, the MAA Contract provides that “[r]efusal of outbound trips is prohibited.” (BWITM ex. 1, p. 4.) Indeed, the MAA Contract provides that BWITM will be fined “\$250.00 per incident” for every “[f]ailure to accept a short trip” by a taxicab driver.¹⁹ (BWITM ex. 1, p. 39.) Additionally, “[c]onsent of all passengers for sharing of a ride is required in advance of a trip.” (BWITM ex. 1, p. 4.) The MAA Contract provides that BWITM will be fined “\$250.00 per incident” for every “[f]ailure to obtain consent of all parties for shared ride.” (BWITM ex. 1, p. 39.) Thus, BWITM has no real control as to whom its taxicab drivers can bring to BWI (“inbound service”) and where they can take passengers departing from BWI (“outbound trips”). It is entirely dictated by the MAA.

2. Control by the MAA – Taxicab Rates

The MAA Contract provides that the “taxicab rate schedule as set forth in the Anne Arundel County Code shall apply to the Contractor’s Taxicab Concession Contract with the Administration and shall be the only rate schedule charged.” (BWITM ex. 1, p. 3.) The Anne Arundel County Code provides for the “Rate schedule and fares” for all taxicabs operating in the county and provides that “Airport taxicabs holding the concession rights to work out of

¹⁸ Additionally, the location where taxicab drivers can drop off incoming fares is dictated by State of Maryland regulation. *See* COMAR 11.03.01.11.A(2) (“All taxicab drivers shall drop off passengers bound for the Airport terminal at the sidewalk curb on the upper level of the terminal public roadway system.”)

¹⁹ BWITM’s taxicab drivers generally do not prefer “short trips,” as it results in a lower fare for the taxicab drivers as compared to what they could earn for a longer passenger trip, and after taking the passenger on a short trip to his or her destination, the taxicab drivers have to return to the taxicab holding area and await their next call to return to the passenger pick up area, essentially going to the back of the line.

Baltimore-Washington International Airport may add a \$0.90 surcharge for trips originating from the airport.” ANNE ARUNDEL COUNTY CODE, § 11-15-302. Thus, BWITM has absolutely no control over the fare rates its taxicab drivers can charge passengers. In addition, as indicated previously, BWITM has absolutely no interest in the amount of fares each taxicab driver earns. (Tr. 24-25.)

3. Control by the MAA – Number of BWITM Taxicabs

When last entered into in 2003, the MAA Contract called for BWITM to “provide 310 heated and air-conditioned taxicabs,” stating that this would remain the number of taxicabs “unless otherwise modified by the Administration.” (BWITM ex. 1, p. 5.) This number has increased since 2003, with the approval of the MAA, to presently be 324 taxicabs. (Tr. 23.) The MAA Contract requires BWITM to increase its number of taxicabs on “thirty (30) days prior written notice” by the MAA. (BWITM ex. 1, p. 5.) Thus, BWITM has no control over the number of taxicabs it provides under the MAA Contract. BWITM only has discretion as to how many leased taxicabs or owner-operator taxicabs it utilizes to reach the number of taxicabs required by the MAA, and could choose to have no leased taxicabs and have all 324 taxicabs be owner-operator taxicabs or have no owner-operator taxicabs and have all 324 taxicabs be leased taxicabs. (Tr. 60.)

4. Control by the MAA – Markings of BWITM Taxicabs

The MAA Contract calls for all BWITM taxicabs to “[c]learly mark all vehicles used in providing service at the Airport with Administration-approved colors, identification symbols and markings to ensure their easy identification by the traveling public. All vehicles shall be

identically marked and painted.” (BWITM ex. 1, p. 7.) Thus, BWITM has little control over the painting and markings of its taxicabs, as they are subject to the approval of the MAA.²⁰

5. Control by the MAA – Prompt Taxicab Service

The MAA Contract requires BWITM to provide prompt service for BWI passengers, with the contract providing that:

The Contractor shall provide taxicab service at the Airport within ten (10) minutes of customer’s request, seven (7) days per week between 6:00 a.m. and 12:00 midnight. Between the hours of 12:00 midnight and 6:00 a.m. each day, seven (7) days per week, the Contractor shall provide taxicab service at the Airport on a demand basis within twenty (20) minutes of a request for such service.

(BWITM ex. 1, p. 3.) Thus, BWITM has no control over the promptness in which it provides taxicab service to passengers at BWI. Indeed, the MAA Contract provides that if BWITM fails to “meet the on-demand service in prescribed amount of waiting time,” BWITM will be fined “\$250.00 per incident.” (BWITM ex. 1, p. 38.)

6. Control by the MAA – Dispatch System for Taxicabs

In order to provide prompt and efficient service to passengers, the MAA Contract requires BWITM to “[e]stablish and operate, at its own cost and expense, a taxicab dispatch and control system.” (BWITM ex. 1, p. 6.) In doing so, BWITM is required by the MAA Contract to provide for a certain number of taxicab dispatchers at specific locations at BWI. (*Id.*) The MAA Contract provides to BWITM certain areas and premises from which to operate to ensure

²⁰ BWITM’s owner-operator contracts state that “[a]ll markings on the vehicle identifying the vehicle as a B.W.I.T.M. cab must be decal or hand painted and applied directly to the vehicle. (Magnetic material is not acceptable).” (BWITM ex. 3, at p. 5) This provision comports with the Anne Arundel County Code, which provides that a taxicab “shall have the full name of the taxicab company *permanently printed* on one door on each side of the taxicab . . . and the vehicle license number *painted* on each side of the taxicab” ANNE ARUNDEL COUNTY CODE, § 11-15-401(a) (emphasis added). This was discussed at the hearing. (Tr. 108-09.)

prompt taxicab service. (BWITM ex. 1, pp. 13-14.) This includes dispatcher desks and what can best be described as a “holding area” for BWITM’s taxicabs, where the taxicabs wait in an orderly fashion until each is called up by a dispatcher to enter the assigned lane where BWITM’s taxicabs pick up passengers. (*Id.*) Taxicab drivers leave the holding area on a “first in line” basis and move to the assigned passenger pick up lane, and any such “dispatch and control system” must be approved by the MAA prior to it being implemented. (BWITM ex. 1, p. 6.) Even the “departure positions” where BWITM’s taxicab drivers pick up passengers at the terminal are assigned by the MAA. (BWITM ex. 1, p. 14.) This dispatching system ensures an orderly and efficient taxicab operation at BWI, as is required under the MAA Contract.

7. Control by the MAA – Cleanliness of Taxicabs

The MAA Contract provides that “[a]ll taxicab vehicles must, at all times, be clean and neat, of good appearance, and mechanically sound with all mechanical and electrical systems (e.g., heater, air-conditioner, internal lights), operational and comfortable for passengers in the sole judgment of the Administration.” (BWITM ex. 1, p. 5.) Regulations regarding the cleanliness of taxicab vehicles also are found in the Anne Arundel County Code, which provides that all taxicabs must be maintained in a “clean and sanitary condition.” ANNE ARUNDEL COUNTY CODE, § 11-15-403. Thus, BWITM has no real control over how “clean and neat” its taxicab drivers keep their taxicabs, nor how “mechanically sound” each taxicab is, as these aspects are dictated by the MAA Contract.²¹

²¹ Because owner-operators own their taxicabs, they are expected to pay for any repairs needed to maintain their taxicabs. (BWITM ex. 3, at p. 5.) Because lease drivers are leasing their taxicabs, they generally are not obligated to pay for repairs to the leased taxicabs. (Tr. 100.) Although the Lease Driver Contract does mention that lease drivers are obligated to pay 50% of the repair cost for any engine or transmission repair, (BWITM ex. 2, at p. 6), it is uncontradicted that no lease driver has ever been charged for engine or transmission repair costs. (Tr. 101.)

8. Control by the MAA – Taxicab Driver Uniforms and Name Tags

The MAA Contract requires that BWITM have its taxicab drivers wear name tags and be dressed in “appropriate uniforms.” (BWITM ex. 1, p. 7.) Specifically, the MAA Contract calls for BWITM to:

Provide all of its taxicab drivers with easily readable, large-size name tags which are acceptable to the Administration. The Contractor shall ensure that these name tags are kept clean and are worn on the outer clothing garment at all times while the taxicab drivers are on duty. Taxicab drivers shall be neatly and cleanly dressed in appropriate uniforms, which are acceptable to the Administration.

(*Id.*) In order to meet its obligations under the MAA Contract, BWITM requires its taxicab drivers to wear black or dark blue pants and a white or light blue shirt. (Tr. 32.) Because the MAA Contract requires the taxicab drivers to be dressed in “appropriate uniforms,” subject to the approval of the MAA, the mere fact that BWITM has established a dress code does not show substantial control by BWITM. All of BWITM’s taxicab drivers provide for their own clothing that meets the requirements of the dress code.

9. Control by the MAA – Records of Taxicab Trips

The MAA Contract requires BWITM to keep certain records of its operations for inspection by the MAA. (BWITM ex. 1, pp. 7-8.) These include “[p]re-numbered Daily Dispatch Sheets,” which must include, “for every outbound taxicab operation,” the “Dispatch Location,” the “Dispatcher,” the “Date and time,” the “Destination,” and the “Taxicab Number.” (*Id.*) In addition, the MAA Contract requires that “[p]re-numbered receipts shall be issued for all outbound taxicab trips by the taxi operator.” (*Id.*) Further, the Anne Arundel County Code mandates that “daily records” and “trip manifests” shall be maintained for all trips taken by

Lease drivers do have to pay for their own gasoline and the costs of keeping their leased taxicab clean. (Tr. 144.) Lease drivers also have to pay the cost of any moving violation tickets they receive. (Tr. 145.)

taxicabs. ANNE ARUNDEL COUNTY CODE, § 11-15-304. Thus, BWITM has little control over the types of daily records and trip manifests required to be maintained by its taxicab drivers.

10. Control by the MAA – Taxicabs Must Have Certain Maps

The MAA Contract requires all BWITM taxicab drivers “obtain and at all times carry in their taxicab vehicles, comprehensive road maps of Maryland, Washington, D.C., Southern Pennsylvania, and Northern Virginia, as well as Baltimore and Annapolis City maps.” (BWITM ex. 1, p. 10.) Thus, BWITM has no control over whether its taxicab drivers must have maps in their taxicabs. Further, an ability to “read and find locations on a map of the County and to comprehend and follow oral directions to a destination” is a requirement of taxicab operators under the Anne Arundel County Code. ANNE ARUNDEL COUNTY CODE, § 11-15-203.²²

11. Control by the MAA – Taxicabs Must Accept Credit Cards

The MAA Contract provides that all of BWITM’s taxicabs are required to accept “major credit cards.” (BWITM ex. 1, p. 5.) BWITM’s taxicab drivers have their own accounts with the credit card companies and pay their own fees to the credit card companies. (Tr. 31-32.)

²² The fact that BWITM may at times test the taxicab drivers operating at BWI under its contract with the MAA as to their familiarity with the surrounding area is not evidence of control, as it merely goes to the requirement that BWITM provide a “high quality” and “efficient” taxicab service to BWI. It could not do this if its taxicab drivers were unfamiliar with the surrounding area. Indeed, the MAA Contract requires BWITM to “assure” that its taxicab drivers are “[f]amiliar with locations of streets, hotels/motels and other destinations within the Baltimore/Washington Metropolitan area,” and that the taxicab drivers be “[c]apable of, and have demonstrated to the Contractor, and ability to . . . Read and find locations within the Baltimore/Washington metropolitan areas on maps of these areas, and . . . Readily comprehend and follow oral directions to a destination.” (BWITM ex. 1, at p. 10.)

12. Control by the MAA – Behavior/Conduct of the Taxicab Drivers

The MAA Contract establishes the behavior expected of BWITM's taxicab drivers so as to provide "a high quality taxicab service" at BWI. (BWITM ex. 1, p. 1.) To this end, the MAA Contract provides that BWITM's taxicab drivers, among other things:

- are not allowed to "solicit" customers at the airport. (BWITM ex. 1, pp. 9, 11; *see also* Tr. 36.)²³;
- "shall not commit any nuisance at the Airport." (BWITM ex. 1, p. 12.);
- must "load and unload passenger baggage promptly, carefully, courteously, and efficiently at the beginning and end of each service trip." (BWITM ex. 1, pp. 6-7.);
- must "conduct themselves in a manner which is courteous, civil and respectful of customers' needs and reasonable expectations for good, fair and prompt service." (BWITM ex. 1, p. 7.);
- are not allowed to "congregate at the taxicab dispatcher desks." (BWITM ex. 1, p. 9.);
- are prohibited from parking "more than the Administration-approved number of taxicabs in the specified loading or staging zones" where passengers are picked up. (BWITM ex. 1, p. 9.);
- are prohibited from "loitering, eating, sleeping, smoking or other conduct that may be detrimental to the image of the Airport and/or the taxicab service." (BWITM ex. 1, pp. 9, 12.);
- are prohibited from "leaving a taxicab at the curb in front of the terminal unattended." (BWITM ex. 1, p. 9.);
- are prohibited from "honking a taxicab horn to cause another taxicab to relocate at the Terminal cab stands." (BWITM ex. 1, p. 9.)

²³ *See also* COMAR 11.03.01.11.A(5) ("Taxicab drivers are prohibited from trying to attract or solicit customers while at the Airport by using hand-held lights, vehicle lights, signs, or other visual/auditory devices or aids, other than those marking and lights required and approved by the local jurisdiction to be mounted on a taxicab.")

Based on the above, it is clear that BWITM is obligated by the MAA Contract to have its taxicab drivers behave in a certain manner and to provide for “good, fair and prompt service” for taxicab customers. Indeed, the MAA Contract requires BWITM to “[b]e responsible for all matter of personnel administration necessary to conduct said taxicab service in an *efficient manner*.” (BWITM ex. 1, p. 7.) Of course, BWITM also desires for its drivers to behave in an appropriate and professional manner at all times so as to engender customer goodwill.

13. Control by the MAA – Responding to Customer Complaints

The MAA Contract requires BWITM to respond to all “customer complaints regarding Contractor’s Airport taxicab services.” (BWITM ex. 1, p. 9.) Specifically, the MAA Contract provides that:

Contractor shall within five (5) calendar days of the date of a written customer complaint is first received by the Contractor make an appropriate written response to the customer, which if further action on the complaint is required, may consist of an acknowledgment of the complaint and a statement of further action to be taken by the Contractor. Customer complaints that are received by telephone are to be responded to immediately by telephone and, followed-up, in writing. Contractor shall submit monthly to the Administration, a copy of each complaint report prepared by the Contractor, and the written response and record of telephone discussions.

(BWITM ex. 1, pp. 9-10.) Thus, BWITM has absolutely no discretion as to whether it responds to customer complaints regarding its taxicab drivers. The MAA has mandated that BWITM respond, and of course any such response must by necessity involve communications between BWITM and the taxicab driver who is the subject of the complaint.²⁴ The mere fact that BWITM may adjust complaints by passengers about taxicab driver service goes only to the core

²⁴ It should be noted that if Anne Arundel County receives a complaint about one of BWITM’s taxicab drivers, Anne Arundel County either investigates the complaint on its own or requires BWITM to investigate and come to a determination, with Anne Arundel County deciding whether any action taken by BWITM is satisfactory. (Tr. 43.)

purpose of the MAA Contract – to provide for “a high quality taxicab service” to BWI. (BWITM ex. 1, p. 1.) Indeed, customer service is BWITM’s “number one priority” under the MAA Contract.²⁵ (Tr. 22.)

14. Control by the MAA – Taxicab Driver Training

The MAA Contract requires that BWITM ensure that its taxicab drivers undergo certain specified training. (BWITM ex. 1, p. 10.) This includes “at least eight (8) hours of customer service training” annually, “at least eight (8) hours of drivers’ safety training annually,” and “[a]ll taxicab operators are also required to undertake the Maryland Taxi Host hospitality training program offered by the Maryland Office of Tourism Development within six (6) months of commencement of their taxicab driving under this Contract.” (*Id.*) Thus, BWITM has no control over whether its drivers must undertake this training – it is mandated by the MAA Contract. Further, the MAA Contract requires BWITM to “*assure*” that its taxicab drivers are “[f]amiliar with locations of streets, hotels/motels and other destinations within the Baltimore/Washington Metropolitan area,” and that the taxicab drivers be “[c]apable of, and have demonstrated to the Contractor, an ability to . . . Read and find locations within the Baltimore/Washington metropolitan areas on maps of these areas, and . . . Readily comprehend and follow oral directions to a destination.” (*Id.*)

²⁵ Several of the provisions in BWITM’s taxicab driver contracts *stem directly* from the need to provide excellent customer service to passengers per the MAA Contract. For example, BWITM’s taxicab drivers are required to “report all items left in his/her cab by a passenger immediately on returning to the airport.” (BWITM ex. 2, at p. 4; BWITM ex. 3, at p. 7.) This is but one of the ways that BWITM ensures that it provides the excellent customer service expected of a “high quality taxicab service” under the MAA Contract.

15. Control by the MAA – Taxicabs are for the *Exclusive Use* of BWITM

The MAA Contract requires that all taxicab drivers “shall be obligated to make their taxicab vehicles available for the Contractor’s *exclusive use* in the conduct of taxicab services twenty-four hours a day, every day of the year.” (BWITM ex. 1, p. 11) (emphasis added.) Thus, the MAA *explicitly prohibits* any of BWITM’s taxicabs from performing taxicab services for any entity other than BWITM at any time.²⁶

16. Control by the MAA – Taxicab Drivers Must Notify
BWITM of License/Permit Issues

The MAA Contract requires BWITM’s taxicab drivers to “immediately notify Contractor of any suspension or revocation of his/her license or permit.” (BWITM ex. 1, p. 11.) Of course, BWITM would expect its taxicab drivers to do this even without such a mandate by the MAA, but the fact remains that such “immediate” notification is demanded by the MAA Contract.²⁷

17. Control by the MAA – Use of MAA Approved Taximeter

The MAA Contract requires BWITM’s taxicab drivers to “use the approved and properly functioning taximeter for all transportation of passengers, failure of which shall be a breach of the subcontract and a sufficient basis for termination of the subcontract.” (BWITM ex. 1, p. 11.) The Anne Arundel County Code also regulates how taximeters are to function. *See* ANNE ARUNDEL COUNTY CODE, § 11-15-402.

²⁶ Mr. Esfarjani testified during the hearing, however, that owner-operators may use their taxicabs for any purpose other than as a taxicab (e.g., using the taxicab for a delivery service or personal use). (Tr. 110-11.) Although lease drivers are leasing their taxicabs for only the 12-hours for which they legally can work as a taxicab driver per day, lease drivers are permitted to take the lease vehicles home and BWITM has no way of knowing or controlling how or whether they are using the leased taxicab during this time. (Tr. 96, 111-12.)

²⁷ In a similar vein, if a taxicab driver is involved in an accident, he or she must submit a written report “within three days after the accident” to Anne Arundel County, providing various information and a description of the accident. ANNE ARUNDEL COUNTY CODE § 11-15-305.

18. Control by the MAA – Termination of Taxicab Driver Contract

The MAA Contract requires BWITM to implement in any contract it has with its taxicab drivers “[a] provision for the termination of the subcontract by Contractor in the event that the [taxicab driver] fails to obey any applicable federal, State, county or local law, or any Airport rule, regulation, or directive.” (BWITM ex. 1, p. 11.) Indeed, the MAA Contract provides that all contracts between BWITM and its taxicab drivers must “clearly set forth the obligations and responsibilities of the [taxicab drivers] in providing services at the Airport,” with the explicit warning that “failure of Contractor to strictly enforce the subcontract agreement . . . shall be considered as a basis for termination of the Contract by the Administration.” (BWITM ex. 1, p. 12.) Thus, BWITM has a very real and immediate incentive to make sure that its taxicab drivers abide by the multitude of regulations set forth in the MAA Contract.

E. BWITM’s Lease Driver Contracts Are A Reflection Of The MAA Contract.

As previously explained, every one of BWITM’s lease drivers enters into a Lease Driver Contract with BWITM prior to performing taxicab services at BWI. (BWITM ex. 2.) In return for a flat stand fee of \$527.00 paid weekly to BWITM, the lease driver is permitted to pick up customers at BWI. (Tr. 24.) Again, BWITM does not receive *any* share or percentage of any fares received by any of the lease drivers in performance of their taxicab services. (Tr. 24-25.)

Looking at the actual language found in the Lease Driver Contract, virtually all of its provisions are *taken from, related to, and/or stem from* the explicit requirements of the MAA Contract. The below chart serves as a reference of just some of the examples of the corresponding provisions of the Lease Driver Contract and the MAA Contract.

Provision	MAA Contract (BWITM ex. 1)	Lease Driver Contract (BWITM ex. 2)
Prohibition on soliciting or conducting incoming fares other than in limited circumstances	Pages 3, 11	Pages 2, 6
Taxicab driver uniforms/dress code	Page 7	Page 3
Taxicab driver required to have certain maps in taxicab	Page 10	Page 4
Taxicab driver responsible for completing daily manifest	Pages 7-8	Page 4
Taxicab driver must annually show that he or she has a valid driver's license and any other permit required by law to operate a taxicab at BWI	Page 11	Page 4
Taxicab driver must complete annual customer service and driver safety training	Page 10	Page 5
Taxicab driver must accept any passenger who requests service	Page 4	Page 5
Taxicab driver must respond to customer complaints	Page 9	Page 5
Taxicab driver must accept credit cards	Page 5	Page 6
Taxicab driver responsible for maintaining "clean" taxicab	Page 5	Page 6
Taxicab driver must immediately notify BWITM of any suspension or revocation of his/her license	Page 11	Page 7
Termination of taxicab driver in the event he or she fails to obey any lawful federal, State, county or local law, rule or regulation, or MAA or Airport rules or regulations	Page 11	Page 11

Based on the above sampling of provisions in the Lease Drivers Contract mandated by the MAA Contract, it is evident that BWITM does not exert significant control over the taxicab

drivers operating at BWI, and that significant control instead stems from the MAA Contract. Although not every single provision found in the Lease Drivers Contract is taken verbatim from the MAA Contract, it is obvious that all provisions concerning the conduct of the lease drivers and how they operate their leased taxicabs emanate from the MAA Contract's requirement that BWITM provide a "high quality taxicab service" and that BWITM's taxicab concession be "operated and managed in a manner that will provide, and meet the requirements, established by the Administration and meet the demands of the public" (BWITM ex. 1, at p. 2.) Further, BWITM has an obligation under the MAA Contract to ensure that its taxicab drivers "will at all times, conduct themselves in a manner which is courteous, civil and respectful of customers' needs and reasonable expectations for good, fair and prompt service." (BWITM ex. 1, at p. 7.) Thus, the mere fact that the Lease Driver Contract prohibits such things as "[t]alking on a cellular phone while boarding customers or while in transit," "[e]xchanging a customer with another driver," and "[a]rguing with a customer, a BWITM employee, MAA official, or police officer," (BWITM ex. 2, at pp. 9-10), although those prohibitions are not explicit in the MAA Contract, is not evidence of control by BWITM, as these prohibitions are derived from the MAA Contract's demand that BWITM's taxicab drivers provide quality customer service.

F. BWITM's Owner-Operator Driver Contracts Are A Reflection Of The MAA Contract.

Like its contracts with lease drivers, BWITM's contracts with owner-operator drivers also are based on the provisions of the MAA Contract. The below chart serves as a reference of examples of just some of the corresponding provisions of the owner-operator contract and the MAA Contract.

Provision	MAA Contract (BWITM ex. 1)	Owner-Operator Contract (BWITM ex. 3)
Weekly Stand Fee	Page 12	Page 3
Taxicabs must be “full size sedans ²⁸ or Administration-approved four-wheel drive vehicles” and no more than six (6) years old	Page 5	Page 5
Taxicab driver responsible for maintaining “clean” taxicab	Page 5	Page 5
Taxicab must be equipped with heating and air conditioning	Page 5	Page 5
Taxicab must be kept in safe and satisfactory working condition	Page 7	Page 5
Taxicab driver uniforms/dress code	Page 7	Page 6
Taxicab driver required to have certain maps in taxicab	Page 10	Page 7
Taxicab driver responsible for completing daily manifest	Pages 7-8	Page 7
Taxicab driver must annually show that he or she has a valid driver’s license and any other permit required by law to operate a taxicab at BWI	Page 11	Page 7
Taxicab driver must immediately notify BWITM of any suspension or revocation of his/her license of permit	Page 11	Page 7
Taxicab driver must complete annual customer service and driver safety training	Page 10	Page 8
Taxicab driver must use properly functioning taximeter	Page 11	Page 8
Taxicab driver must respond	Page 9	Page 8

²⁸ There was some questioning during the hearing as to whether “full size sedan” meant a taxicab vehicle having at least a six-cylinder engine, as is required in BWITM’s contracts with owner-operators. (Tr. 107-08.) Mr. Esfarjani testified that it is his understanding that the MAA Contract means no less than a six-cylinder engine on a vehicle when it specifically requires taxicabs operating at BWI to be “full size sedans.” (*Id.*)

to customer complaints		
Taxicab driver must accept any passenger who requests service	Page 4	Page 8
Prohibition on soliciting or conducting incoming fares other than in limited circumstances	Pages 3, 11	Page 9
Taxicab driver must accept credit cards	Page 5	Page 10
Termination of taxicab driver in the event he or she fails to obey any lawful federal, State, county or local law, rule or regulation, or MAA or Airport rules or regulations	Page 3	Page 12

As with the lease drivers, the above sampling of provisions in the owner-operator's contract mandated by the MAA Contract shows that BWITM does not exert significant control over the taxicab drivers operating at BWI, and that significant control instead stems from the MAA Contract. Although not every single provision found in the owner-operator's contract is taken verbatim from the MAA Contract, it is obvious that all provisions concerning the conduct of the owner-operators and how they operate their taxicabs emanate from the MAA Contract's requirement that BWITM provide a "high quality taxicab service" and that BWITM's taxicab concession be "operated and managed in a manner that will provide, and meet the requirements, established by the Administration and meet the demands of the public" (BWITM ex. 1, at p. 2.) Further, BWITM has an obligation under the MAA Contract to ensure that its taxicab drivers "will at all times, conduct themselves in a manner which is courteous, civil and respectful of customers' needs and reasonable expectations for good, fair and prompt service." (BWITM ex. 1, at p. 7.) Thus, the mere fact that the owner-operator's contract prohibits such things as "[t]alking on a cellular phone while boarding customers or while in transit," "[e]xchanging a

customer with another driver,” and “[a]rguing with a customer, a BWITM employee, MAA official, or police officer,” (BWITM ex. 3, at pp. 10-11), although those prohibitions are not explicit in the MAA Contract, is not evidence of control by BWITM, as these prohibitions are derived from the MAA Contract’s demand that BWITM’s taxicab drivers provide quality customer service. This aspect of the owner-operator’s contract was apparently lost on the Acting Regional Director, who determined that because these “offenses [were] . . . not listed in the contract between the MAA and the Employer” (Decision at p. 7), they somehow evince substantial control by BWITM. The Acting Regional Director was seemingly oblivious to the fact that these prohibitions are derived from the MAA Contract’s demand that BWITM’s taxicab drivers provide quality customer service.

V. THE ACTING REGIONAL DIRECTOR’S REJECTION OF INDEPENDENT CONTRACTOR STATUS WAS CLEARLY ERRONEOUS, AS BOTH BOARD AND CASE LAW PRECEDENT MAKE CLEAR THAT BWITM’S LEASE DRIVERS AND OWNER-OPERATOR DRIVERS ARE INDEPENDENT CONTRACTORS UNDER THE NLRA

A. The Acting Regional Director’s Decision Does Not Comport With Established Board Precedent And Long-Standing Case Law Concerning Taxicab Driver Status Under The NLRA.

Because this matter involves the issue of whether BWITM’s taxicab drivers are independent contractors or employees, the Board generally looks to the common law test of agency to make such a determination. *See Roadway Package System*, 326 NLRB 842 (1998). Taxicab drivers have been the subject of numerous Board decisions in this regard, and Board precedent states that in matters involving whether taxicab drivers are independent contractors or employees under the NLRA, the two most significant factors to consider in the analysis are “the lack of any relationship between the company’s compensation and the amount of fares collected,” and “the company’s lack of control over the manner and means by which the drivers

conducted business after leaving the [company's] garage.” *AAA Cab Services, Inc.*, 341 NLRB 462, 465 (2004). Despite the Decision of the Acting Regional Director, analysis of both of these significant factors demands a finding of independent contractor status for both BWITM's owner-operator drivers and lease drivers.

1. The Record Established That There Is No Relationship Between BWITM's Compensation From Its Taxicab Drivers And The Amount Of Fares Those Taxicab Drivers Collect.

The record is uncontradicted that there is absolutely *no relationship* between the stand fees BWITM charges its taxicab drivers on a weekly basis, whether they be owner-operators or lease drivers, and the amount of fares, if any, collected by the taxicab drivers. The Acting Regional Director acknowledged this fact in his Decision, stating that “[t]he drivers pay the Employer a flat weekly rate for the right to service BWI, and do not share their commissions with the Employer.” (Decision at p. 2.) Thus, per Board precedent, there is not just an inference – but a “*strong inference*” – that BWITM's taxicab drivers are independent contractors and not employees. *See City Cab Company of Orlando*, 285 NLRB at 1194; *see also Air Transit, Inc.*, 271 NLRB 1108, 1111 (1984) (the Board stating that “[w]e particularly stress that the Company's earnings were based on the number of drivers paying stand dues” in reaching its conclusion that taxicab drivers were independent contractors under NLRA) (emphasis added). In reaching his Decision, the Acting Regional Director only paid lip service to Board precedent regarding this “strong inference,” quickly tossing it aside in order to arrive at his results-oriented, *ad hominem* Decision. This, quite frankly, is unacceptable.

2. The Record Established That Nearly All Of The Work Rules As To The Manner and Means Of BWITM's Taxicab Driver's Performance Of Taxicab Services Emanate From The MAA Contract, And Thus There Is A Lack Of Substantial Control By BWITM.

Having established a “strong inference” that BWITM's taxicab drivers are independent contractors under Board precedent, the analysis then turns to the second significant factor, *i.e.*, “the company's lack of control over the manner and means by which the drivers” perform their work. Due to the expansive nature of the MAA Contract, there is very little in the way of actual “control over the manner and means” of the taxicab drivers' performance by BWITM. *See Checker Cab Co.*, 273 NLRB 1492 (1985) (Board stating, in a decision holding that taxicab drivers were independent contractors and not employees of taxicab company, that “the greater the control exerted by the governmental entity, the less opportunity for control by the putative employer”). There certainly does not exist the “substantial control” necessary for a finding of employee status under the NLRA.

The Acting Regional Director ignored this reality when arriving at his Decision, stating that he relied “on those work rules that are not mandated by the MAA or other governmental agencies to establish that there is sufficient Employer control” for a finding of employee status for BWITM's taxicab drivers. (Decision at p. 10.) In doing so, the Acting Regional Director applied a standard heretofore unheard of in regard to situations where a governmental agency mandates how taxicab drivers are to operate, essentially holding that if the work rules governing how BWITM's taxicab drivers are to operate are not *explicitly mandated* in the MAA Contract, then any such work rules evince “control” by BWITM substantial enough to establish an employer-employee relationship. Thus, the Acting Regional Director chose to disregard the fact that virtually all of the work rules for BWITM's taxicab drivers *stem from* the requirements

found in the MAA Contract and thus are not evidence of substantial control by BWITM sufficient to overcome the established “strong inference” of independent contractor status. *See Air Transit, Inc.*, 271 NLRB 1108, 1111 (1984) (Board finding that taxicab company that contracted with government to provide taxicab services at Dulles International Airport was not an employer of taxicab drivers under the NLRA, and observing, in the context of analysis into the company’s control over the taxicab drivers, that “[n]early all of the factors allegedly demonstrating control over the manner and means of the drivers’ performance of their duties stem from the requirements imposed by the FAA contract . . . and thus do not constitute evidence of employer control”) (emphasis added).

In making his determination that BWITM exerts substantial control over the manner and means over the performance of its taxicab drivers, the Acting Regional Director stated that “[w]hile the MAA maintains some provisions governing the conduct of drivers in its contract with the Employer, the Employer enforces numerous other requirements in its contracts with drivers, including detailed daily and weekly work schedules. The owner operators must work five days every week, every other weekend, and every other federal holiday, and lease drivers must work six days every week.” (Decision at p. 10.) The Acting Regional Director’s reliance on this assertion is puzzling, as it was uncontradicted at the hearing that BWITM’s taxicab drivers may choose to work from zero hours up to 12 hours in their 15-hour shift window, so long as their weekly stand fee is paid. (Tr. 15-16, 112.) Thus, there was no record evidence that BWITM actually “enforces” any such work schedule for its taxicab drivers and the Acting

Regional Director's statement to the contrary is simply inaccurate and mischaracterizes the record.²⁹

In reaching his Decision, the Acting Regional Director also placed improper emphasis on the fact that “[t]he Employer dispatchers tell drivers when to move up one space in line at the terminal, and call up drivers to advance from the holding area to the line in the staging area.” (Decision at p. 10.) How this aspect of the dispatch system in effect at BWI demonstrates substantial control by BWITM over the manner and means of its taxicab drivers’ performance is unclear. The MAA Contract *mandates* that BWITM “establish” a dispatch system for its taxicabs in order to ensure prompt service to passengers, and that any such dispatch system must meet the “written approval” of the MAA. (BWITM ex. 1, p. 6.) Such a dispatch system is certainly no bar to independent contractor status. *See Air Transit, Inc. v. NLRB*, 679 F.2d 1095, 1097 (4th Cir. 1982) (finding of independent contractor status of taxicab drivers in situation where dispatch system at airport operated on a “‘first in first out’ basis. Each taxicab is filled in order to its position in line. When the front taxicab is loaded and pulls out, the remaining taxicabs move forward”).

The Acting Regional Director also placed apparent importance on the fact that BWITM requires its lease drivers to have their leased taxicabs serviced at a certain repair station and

²⁹ Further, the mere fact that BWITM has established two shifts, a morning shift and an evening shift, for its taxicab drivers to work is not the type of control indicative of BWITM having substantial control over the manner and means of the taxicab drivers’ work. As explained, BWITM utilizes a two-shift system so as to ensure that it has taxicabs available to BWI passengers twenty-four hours a day, seven days a week, as is explicitly required under the MAA Contract. Taxicab drivers can choose to work however many hours they wish during their assigned 15-hour shift window, so long as they do not exceed working as a taxicab driver for more than 12 hours in any 24-hour period because it is prohibited by the Anne Arundel County Code.

perform routine maintenance every 3000 miles. (Decision at p. 10.) The import of this requirement is negligible and certainly does not show substantial control over the manner and means of the lease drivers' performance sufficient to establish an employer-employee relationship. The Acting Regional Director was seemingly oblivious to the fact that BWITM has an understandable interest in ensuring that the taxicabs that are leased out to its lease drivers are adequately maintained so that they remain in good working order.

The Acting Regional Director also stated in his Decision that the fact that BWITM at times disciplines its taxicab drivers by suspension or fines is enough to establish substantial control by BWITM over the manner and means of performance of its taxicab drivers. (Decision at p. 10.) This is not so. Indeed, decisions involving taxicab companies state that the mere fact that the company at times disciplines its taxicab drivers does not mean those taxicab drivers are employees. *See AAA Cab Services*, 341 NLRB at 465 (finding that taxicab company's "ability to counsel drivers and terminate their leases based on customer complaints does not establish control sufficient to show an employer-employee relationship"); *Sida of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975) (observing that the prompt resolution of customer complaints regarding taxicab drivers was beneficial to all parties and was not the type of control indicative of an employer-employee relationship under the NLRA); *Gator City Taxi*, 13-RC-20625, at 7 (July 10, 2001) (Regional Director finding that taxicab drivers were independent contractors and not employees of taxicab company even where taxicab drivers were "suspended for a specified period of time if they engage[d] in certain prohibited acts, such as refusing a fare at the airport . . ."). Moreover, in *Air Transit, Inc. v. NLRB*, 679 F.2d 1095 (4th Cir. 1982), the Fourth Circuit observed that although Air Transit at times disciplined its taxicab drivers, any such discipline was meant as a way to enforce rules mandated by Air Transit's contract with the FAA so that Air

Transit's contract with the FAA would not be placed in jeopardy, and that "[c]ontrols which are designed to protect Air Transit's contract with the FAA *obviously inure to the benefit of the drivers as well as Air Transit*" and were not inconsistent with independent contractor status. *Id.* at 1100 (emphasis added). The same is true in the present matter, as BWITM must have some means of ensuring that its taxicab drivers perform in a manner consistent with what is demanded of BWITM under the MAA Contract so that its contract with the MAA is not placed in jeopardy.

The Acting Regional Director's Decision also states that a finding of employee status is warranted because "[t]he Employer's drivers do not have the opportunity to 'make an entrepreneurial profit.'" (Decision at p. 11.) In making this assertion, the Acting Regional Director *ignored completely* the MAA Contract's mandate that BWITM's taxicab drivers make their taxicabs available for BWITM's "*exclusive use . . . twenty-four hours a day, every day of the year.*" (BWITM ex. 1, p. 11) (emphasis added.) Thus, the Acting Regional Director's assertion that the fact that BWITM's taxicab drivers cannot, as he put it, work for other "taxi outfits," somehow lends support to his finding of employee status is erroneous. The Acting Regional Director may not continually ignore the constraints placed on BWITM and its drivers by the MAA Contract in order to arrive at an obviously preordained, results-oriented, *ad hominem* Decision that BWITM's taxicab drivers are employees and not independent contractors. Further, BWITM's lease drivers are prohibited by County code from using their leased taxicabs to operate for another owner. *See ANNE ARUNDEL COUNTY CODE*, § 11-15-201(b)(2) (stating that "[a] taxicab operator shall . . . operate only for the owner designated on the operator's license unless the Department provides written permission for the operator to operate for another owner"). The Acting Regional Director also ignored the uncontradicted testimony that BWITM's owner-operators may use their taxicabs *for any purpose other than as a*

taxicab (e.g., using the taxicab for a delivery service or personal use) (Tr. 110-11), and that BWITM's lease drivers, although they are only leasing their taxicabs for the 12-hours for which they legally can work as a taxicab driver per day, are permitted to take their leased taxicabs home and BWITM *has no way of knowing or controlling how or whether they are using the leased taxicab during this time.* (Tr. 96, 111-12.) Again, the Acting Regional Director's Decision is fraught with inaccuracies and mischaracterizations of the record.

The Acting Regional Director's assertion that BWITM's taxicab drivers are not independent contractors because BWITM "does not individually negotiate the terms of the drivers' contracts as would be expected if these drivers were independent contractors" (Decision at p. 11), makes little sense under the circumstances of the present matter. In making such an assertion, the Acting Regional Director *ignored yet again* the fact that BWITM has a contract with the MAA that imposes extensive regulations on BWITM that it must obey or risk losing its contract, and thus negotiation of terms of each taxicab driver's contract is unrealistic. As regards BWITM's owner-operators, even the weekly stand fee amount that BWITM collects from each owner-operator is dictated by the MAA Contract. Although the MAA Contract does not specify the weekly stand fee for BWITM's lease drivers, the fact that BWITM charges a standardized weekly stand fee from its lease drivers, and sets other standardized terms in its contracts with lease drivers, is of no consequence to the independent contractor/employee analysis. Indeed, the Board has previously observed that "[t]he fact a driver leases his/her taxicab rather than owning it does not preclude a finding of independent contractor status for the driver. The fact the lessor sets standardized lease terms in a leasing agreement is indicative only of the relative bargaining power of the lessor and *is irrelevant to the issue of control in determining the status of drivers regarding whether they are employees or independent contractors.*" *City Cab Company of*

Orlando, 285 NLRB at 1193-94 (emphasis added); *see also NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 921 (11th Cir. 1983) (holding that lease drivers for taxicab company were independent contractors and observing that the fact that the taxicab company “sets the standardized lease terms and in some instances unilaterally changes them, even if true, is indicative only of relative bargaining power, not an employer-employee relationship”).³⁰ Instead of properly acknowledging this established Board and court precedent, the Acting Regional Director instead chose to ignore it completely in order to reach his determination of employee status.

The Acting Regional Director also apparently based his Decision finding employee status for BWITM’s taxicab drivers on the fact that “the owner-operators here, as well as the lease drivers, devote a substantial amount, if not all, of their time, labor, and equipment to performing essential functions that allow the Employer to deliver airport taxi service.” (Decision at p. 11.) While the fact that individuals perform functions that are an essential part of the employer’s operations is a factor that is oftentimes considered in the common law test of agency, *it has also been held to be of no real significance in the context of the taxicab industry. See Associated Diamond Cabs, Inc.*, 702 F.2d at 924 (observing that fact that the work performed by taxicab drivers was an essential part of the company’s operation “proves nothing in regard to the inquiry before us as it is also true in many relationships which are undoubtedly that of a company to independent contractors”). Indeed, the taxicab drivers at issue in *AAA Cab Services*, *Air Transit*, *Checker Cab Co.*, and *City Cab Company of Orlando* obviously all performed an “essential part”

³⁰ It is clear from the testimony of Mr. Yemenu that the lease drivers are unhappy that their relative bargaining power leaves them little choice but to accept the terms of the lease driver agreements. But, as the Board has held, such relative bargaining power is irrelevant to a taxicab driver’s employee status.

of the taxicab companies' operations, and this proved no bar to a finding of independent contractor status for the taxicab drivers in all of those Board decisions. Thus, the Acting Regional Director's emphasis on the fact that BWITM exists to provide taxicab services at BWI to find that BWITM's taxicab drivers are employees, and not independent contractors, is erroneous.

Based on all of the above, it is obvious that the reasoning behind the Acting Regional Director's Decision finding that the "strong inference" of independent contractor status established by BWITM was somehow rebutted by evidence of "substantial control" over the manner and means of taxicab drivers' performance by BWITM is fundamentally flawed, both in its disregard for established Board precedent and case law, and in its willingness to mischaracterize the record in order to achieve the Acting Regional Director's ends – a finding of employee status for BWITM's taxicab drivers.

B. The Acting Regional Director's Assertion That The Cases Cited By BWITM To Support Its Position "Are Inapposite" Is Wholly Unconvincing.

In his Decision, the Acting Regional Director concluded that certain decisions cited by BWITM to support its position that its taxicab drivers are independent contractors were "inapposite." (Decision at p. 11.) Yet, the reasons provided by the Acting Regional Director as to why the decisions are not pertinent are *wholly unconvincing*.

1. *Checker Cab Co., 273 NLRB 1492 (1985)*

The Acting Regional Director stated that *Checker Cab Co.* was "inapposite" because, in that case, "drivers did not have to use the employer-provided dispatch system, were free to obtain fares on their own, and had no work schedules imposed by the employer." (Decision at p. 11.) These are all specious reasons to find *Checker Cab Co.* "inapposite."

In his attempt to distinguish *Checker Cab Co.* by asserting that the taxicab drivers in that matter “did not have to use the employer-provided dispatch system,” the Acting Regional Director apparently forgot (or, perhaps more likely, consciously ignored) the fact that the MAA Contract *requires* BWITM to “establish” a dispatch system and limits BWITM (and thus BWITM’s taxicab drivers) to providing taxicab service at BWI *only* through the use of that dispatch system, which must meet the “written approval” of the MAA.

In regard to his observation that the *Checker Cab Co.* decision is “inapposite” because the taxicab drivers in that matter were “free to obtain fares on their own,” the Acting Regional Director ignored the fact that the MAA Contract explicitly limits the types of trips that BWITM’s taxicabs can make, specifically prohibiting almost all types of incoming fares to BWI and mandating that refusal of outbound trips is prohibited. Further, as stated, the MAA Contract provides that BWITM’s taxicab drivers must pick up fares at BWI through the use of the dispatch system.

Lastly, as regards there having been “no work schedules imposed by the employer” in *Checker Cab Co.*, it is uncontradicted in the present matter that BWITM’s taxicab drivers may work from zero to 12 hours during their assigned 15-hour shift window, and nothing else is “imposed” on them by BWITM. Thus, the Acting Regional Director’s finding of *Checker Cab Co.* as “inapposite” to the present matter is baseless.

2. *AAA Cab Services*, 341 NLRB 462 (2004)

The Acting Regional Director stated that *AAA Cab Services* was “inapposite” because “unlike in the instant case, the drivers could reject calls from dispatchers, set their own days and hours of work, dress as they pleased, and were not subject to any employer-issued handbooks, policy manuals, or rules of conduct for taxi drivers.” (Decision at p. 11.) Again, the reasons

given by the Acting Regional Director for finding *AAA Cab Services* “inapposite” are completely unconvincing. First, the taxicab drivers in *AAA Cab Services* were not providing taxicab services at an airport through the use of a dispatch system, as is the case here, so the import of the fact that those drivers in *AAA Cab Services* could “reject calls from dispatchers” is unclear.

In regard to the fact that the taxicab drivers in *AAA Cab Services* could “set their own days and hours or work,” again, it is uncontradicted in the present matter that BWITM’s taxicab drivers may work from zero to 12 hours during their assigned 15-hour shift window, and nothing else is “imposed” on them by BWITM.

Additionally, the Acting Regional Director’s emphasis on the fact that the taxicab drivers in *AAA Cab Services* could “dress as they pleased” *makes absolutely no sense*, as the MAA Contract *mandates* that BWITM’s taxicab drivers be dressed in “appropriate uniforms.” Thus, BWITM has no discretion as to whether its taxicab drivers can “dress as they please.” Oddly enough, the Acting Regional Director even acknowledged earlier in his Decision that “[a]ll drivers are required by the MAA to wear uniforms.” (Decision at p. 4.) But he conveniently ignored this fact when characterizing *AAA Cab Services* as “inapposite” in order to arrive at what is obviously a results-oriented Decision.

Lastly, the Acting Regional Director’s reference to the fact that the taxicab drivers in *AAA Cab Services* were not subject to any “rules of conduct” totally (and quite unbelievably) ignores the central factor in this case, *i.e.*, the fact that the MAA Contract controls *nearly all* of the manner and means of the taxicab drivers’ performance, including the general conduct of BWITM’s taxicab drivers. Moreover, although the taxicab company in *AAA Cab Services* did not issue written rules of conduct for its taxicab drivers, the taxicab company did fine taxicab drivers who accepted calls from dispatch and then failed to service the fares, and also adjusted

customer complaints against taxicab drivers, which at times resulted in termination of the taxicab drivers' lease agreement. Despite this, the taxicab drivers were still found to be independent contractors and not employees under the NLRA.

3. *Air Transit, Inc. v. NLRB*, 679 F.2d 1095 (4th Cir. 1982)

In what is undoubtedly his most egregious assertion of a case cited by BWITM being “inapposite” to the present matter, the Acting Regional Director asserted that the Fourth Circuit’s decision in *Air Transit, Inc. v. NLRB* was “inapposite” because, “unlike in the instant matter, the drivers selected their own fuel sources and retained ‘absolute personal control’ over their work schedules including hours, shifts, and routes.” (Decision at p. 11.) This contention is absurd.

First of all, BWITM has absolutely no idea what the Acting Regional Director is referring to when he insinuates that BWITM’s taxicab drivers do not select “their own fuel sources.” It is undisputed that BWITM’s owner-operator drivers pay for their own gasoline and select their own “fuel sources” to do so, and the same is true for BWITM’s lease drivers. (Tr. 144.) It is disingenuous for the Acting Regional Director to state that *Air Transit* is “inapposite” because of this baseless “fuel sources” assertion, which plainly mischaracterizes the record.

Second, the fact that the taxicab drivers in *Air Transit* had discretion as to their work schedules does not make that decision “inapposite.” Again, it is uncontradicted that BWITM’s taxicab drivers may work from zero to 12 hours during their assigned 15-hour shift window, and nothing else is “imposed” on them by BWITM. Thus, BWITM’s taxicab drivers possess considerable discretion as to when and how often they work. Just as with *Checker Cab Co.* and *AAA Cab Services*, the Acting Regional Director’s assertion that *Air Transit* is “inapposite” to the present matter is completely unconvincing and only demonstrates the Acting Regional Director’s Decision was improperly result-oriented.

Indeed, far from being “inapposite,” the instant matter is *markedly similar* to that before the Fourth Circuit in *Air Transit*. *Air Transit* concerned taxicab drivers who operated out of Dulles International Airport pursuant to Air Transit’s concession contract with the Federal Aviation Administration (FAA) for the “exclusive right to operate a taxicab service” from Dulles. *Id.* at 1096. Just like BWITM, Air Transit did not receive any share or percentage of its taxicab drivers’ fares, but instead required from the drivers a stand fee that was paid weekly to the taxicab company. As explained by the Fourth Circuit:

Air Transit satisfies its contractual obligations by utilizing the services of approximately 100 taxicab drivers who provide their own vehicles. . . .

Air Transit charges each driver a “stand fee” of \$72.00 per week^[31] for the privilege of participating in the feed line^[32] and operating under its contact with the FAA. Air Transit does not receive a share or percentage of the drivers’ earnings. The stand fee is fixed and totally unrelated to the number of hours worked or the amount of money earned.

Id. at 1096-97; *see also Seafarers Local 777 (Yellow Cab)*, 603 F.2d at 876 (lease drivers for taxicab company were independent contractors and not employees where they were “not required to produce any revenue and the company receives the same amount of money irrespective of the amount the driver receives”).

³¹ The Fourth Circuit noted that “some drivers lease taxicabs from other drivers,” and the drivers who chose to lease their taxicabs were charged a higher stand fee. *Id.* at 1097 n.4. This is identical to the situation at BWI with second drivers.

³² As the Fourth Circuit noted regarding Air Transit’s use of a “feed line,” the “[r]ules on conduct for the operation of the feed line were established at a drivers’ meeting called by Air Transit.” *Id.* at 1097 n.3. Thus, the FAA did not mandate how the feed line was to operate. The “feed line” itself operated on a “‘first in first out’ basis. Each taxicab is filled in order of its position in line. When the front taxicab is loaded and pulls out, the remaining taxicabs move forward.” *Id.* at 1097. BWITM’s own passenger pick up line operates in much the same way, *i.e.*, on a “first in first out” basis. (Tr. 14.) In the case of BWITM, however, the MAA Contract provides that any such “dispatch and control system” must meet the “written approval” of the MAA. (BWITM ex. 1, p. 6.) Thus, BWITM has even less control over this aspect of its taxicab drivers’ performance than Air Transit had in its concession contract.

In applying the common law agency test to determine whether the taxicab drivers were to be considered independent contractors or employees for the purposes of the NLRA, the Fourth Circuit found that “it is *clear* that the taxicab drivers should be classified as independent contractors for the purposes of the Act.” *Air Transit, Inc.*, 679 F.2d at 1099 (emphasis added). The court found significant to its conclusion the fact that:

The stand fees paid by the drivers are fixed and unrelated to their earnings. No trip sheets or other accountings of fares are required.^[33] Air Transit makes no attempt to share in a percentage of the drivers’ earnings. *This creates a strong inference that Air Transit does not exercise substantial control over the means and manner of the drivers’ performance of their work.*

Air Transit, Inc., 679 F.2d at 1099 (emphasis added); *see also Seafarers Local 777 (Yellow Cab)*, 603 F.2d at 879 (observing that “[w]hen a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a *strong inference* that the cab company involved does not exert control over ‘the means and manner’ of his performance”) (emphasis added).

The Fourth Circuit also pointed to other factors indicating that the taxicab drivers were independent contractors and not employees of Air Transit, including that they owned their own vehicles, maintained their own automobile insurance, paid their own Social Security and income taxes, and that the contracts they entered into with Air Transit specifically provided that they were independent contractors. *Air Transit, Inc.*, 679 F.2d at 1099-1100; *see also NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 385 (3d Cir. 1979) (finding relevant to independent contractor/employee analysis that fact that “[t]he agreement between [company] and the owner-

³³ While BWITM’s taxicab drivers are required to keep a daily manifest of customer trips, this is mandated by the Anne Arundel County Code and thus is not indicative of substantial control supporting an employer-employee relationship. ANNE ARUNDEL COUNTY CODE, § 11-15-304.

operators expresses an intent to make the owner-operators independent contractors”) (alteration added).

In reaching its decision that the taxicab drivers were independent contractors and not employees of Air Transit, the Fourth Circuit reversed the findings of the Board in *Air Transit, Inc.*, 256 NLRB 278 (1981). The Board revisited the Air Transit/Dulles matter following the Fourth Circuit’s reversal and, in *Air Transit, Inc.*, 271 NLRB 1108 (1984), the Board admitted that it was mistaken in its earlier decision and that the taxicab “drivers were and are independent contractors” and therefore excluded from coverage under the NLRA. *Id.* at 1111. In its decision, the Board acknowledged that “[n]early all of the factors allegedly demonstrating control over the manner and means of the drivers’ performance of their duties *stems from the requirements imposed by the FAA contract . . . and thus do not constitute evidence of employer control.*” *Id.* (emphasis added); *see also Checker Cab Co.*, 273 NLRB at 1492 (discussing the Board’s decision in *Air Transit* and observing that the fact that “[t]he FAA imposed an extensive array of regulations on Air Transit which it in turn required its drivers to obey” was a principal reason for the finding of independent contractor status).

It is remarkable how similar the facts at issue in *Air Transit* are to the present matter involving BWITM, particularly to its relationship with owner-operators. Both matters involve a company that was awarded an exclusive concession contract by a government airport operator to provide taxicab services for customers traveling from the airport. Both involve taxicab drivers who pay only a weekly stand fee to the company for the privilege of picking up customers from the airport, with no share or percentage of the taxicab drivers’ earnings being received by the company. Both involve taxicab drivers who do not receive any sort of paycheck or other remuneration from the company, and who are expected to pay their own Social Security and

income taxes. While it is true that matters are to be decided on their individual facts on a case-by-case basis, this is just about as close as it gets. Thus, just as the Fourth Circuit found in *Air Transit*, the circumstances here also make clear that BWITM's taxicab drivers are to be considered independent contractors under the NLRA, as analyzed under applicable court and Board precedent. For the Acting Regional Director to discount the Fourth Circuit's decision in *Air Transit* as "inapposite" with a one-sentence remark that makes little sense in its reference to taxicab drivers selecting their "own fuel sources" is *inexcusable*, and both the Fourth Circuit's decision in *Air Transit* and the Board's subsequent revisiting of the *Air Transit* matter, in which the Board admitted that the Fourth Circuit was correct and that the taxicab drivers providing taxicab services at Dulles International Airport pursuant to Air Transit's exclusive concession contract with the FAA were independent contractors and not employees, support the conclusion that BWITM's taxicab drivers are also independent contractors.

It is glaringly obvious why the Acting Regional Director quickly rejected *Checker Cab Co.*, *AAA Cab Services*, and *Air Transit* as being "inapposite" to the present matter – all of those cases found that the "strong inference" of independent contractor status of taxicab drivers was established by the taxicab companies' use of a flat, stand fee system of compensation entirely unrelated to the fares collected by taxicab drivers and each concluded that the taxicab drivers were indeed independent contractors and not employees under the NLRA. But because this Board and case law precedent did not support the outcome desired by the Acting Regional Director, they were disregarded as "inapposite" with faulty reasoning that, as shown above, is easily refuted.

C. The Acting Regional Director's Decision Contradicts A June 2010 Decision By The Regional Director Dismissing A BWITM Taxicab Driver's Unfair Labor Practice Charge, And In Which The Region Found That BWITM's Owner-Operator Drivers And Lease Drivers Were Independent Contractors And Not Employees Under The NLRA.

That the Acting Regional Director's Decision is clearly erroneous also is apparent due to the fact that in June 2010, the Regional Director made a determination that dismissed an unfair labor practice claim brought by one of BWITM's taxicab drivers *because the taxicab driver was found to be an independent contractor and not an employee under the NLRA.* (Exhibit A.)³⁴ Indeed, although the ULP charge was brought by a second driver, the Regional Director's dismissal explained that both BWITM's owner-operators and lease drivers were not considered employees under the NLRA, but *were properly considered independent contractors:*

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The investigation revealed that there are three categories of taxicab drivers employed by the Employer at the BWI Airport: (1) Lease or ATM Drivers; (2) Owner-Operators; and (3) 2nd Drivers. Although there is some evidence to support your argument that the taxicab drivers in classifications (1) and (2) are employees under the Act, *the preponderance of the evidence reveals drivers in classifications (1) and (2) are independent contractors and not employees within the meaning of the Act.* Some of the evidence supporting this conclusion is the fact that these drivers are charged a set, flat rental or stand fee for operating their vehicles, select the hours they wish to work within a 12 hour period, and are allowed to subcontract their work with limited restrictions. *These factors establish a strong inference of independent contractor status, a conclusion that is not overcome by the Employer's maintenance and application of a disciplinary regime.*

(Exhibit A.)

In light of the above, there exists a glaring inconsistency with the Acting Regional Director's Decision, which found that BWITM's owner-operators and lease drivers are

³⁴ Although the Regional Director's June 2010 dismissal of the ULP charge and finding that BWITM's taxicab drivers (both owner-operators and lease drivers) are independent contractors and not employees under the NLRA was not part of the record at the hearing, it nonetheless should be considered as it is a decision of this very agency.

employees under the NLRA, and the Regional Director's June 2010 ULP charge dismissal, which held that the same owner-operators and lease drivers are independent contractors, and which BWITM submits was correctly decided in accordance with established Board precedent.³⁵ This inconsistency is but one more reason why the Board should grant BWITM's Request for Review.

VI. CONCLUSION

Based on the foregoing, it is obvious that both the lease drivers and owner-operator drivers performing taxicab services at BWI pursuant to BWITM's exclusive concession contract with the MAA are independent contractors and not employees of BWITM. As the record makes clear and the Acting Regional Director was forced to acknowledge, BWITM's earnings in no way correspond to the amount of fares collected by the taxicab drivers. Additionally, BWITM has very little actual control over the manner and means of how the taxicab drivers conduct their business, as nearly every aspect of how the taxicab drivers are allowed to operate is covered by the MAA Contract or by Anne Arundel County Code. For example, the MAA contract explicitly limits the circumstances under which taxicab drivers can bring incoming fares to BWI, mandates that the taxicab drivers cannot refuse an outbound fare, prohibits taxicab drivers from soliciting fares, requires that all taxicab drivers wear "appropriate uniforms," dictates that taxicab drivers' taxicabs are for the "exclusive use" of BWITM, requires annual driver training by all taxicab drivers, requires that taxicab drivers pick up passengers requesting service within a certain

³⁵ This inconsistency is likely due to the fact that the Acting Regional Director, Mr. Glasser, is the Regional Director for the Detroit Regional Office (Region 7) and apparently was assigned this matter pursuant to the interregional assistance program. There is no indication that Mr. Glasser had any knowledge of the Region 5 Regional Director's June 2010 dismissal of the ULP charge, which held that the same taxicab drivers are independent contractors and not employees under the NLRA.

limited amount of time, and so on. For the Acting Regional Director to hold that BWITM's taxicab drivers are employees of BWITM is a drastic departure from the cited Board precedent concerning independent contractor/employee status of taxicab drivers, runs afoul of the long-standing decision of the Fourth Circuit in *Air Transit*, a case concerning a factual situation nearly indistinguishable from that now at issue, and is inconsistent with the June 2010 decision from the Regional Director that found BWITM's owner-operator drivers and lease drivers to be independent contractors.

WHEREFORE, for all the foregoing reasons, BWITM respectfully requests that the Board grant its Request for Review of the Acting Regional Director's Decision and Direction of Election.

Respectfully submitted,

/s/ Gil A. Abramson

Gil A. Abramson

Clifton R. Gray

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Gil.Abramson @jacksonlewis.com

Counsel for BWI Taxi Management, Inc.

Dated: September 30, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September 2010 a true and correct copy of the foregoing Request for Review of the Acting Regional Director's Decision and Direction of Election was served via overnight mail on the following:

Wayne Gold
Regional Director
National Labor Relations Board
103 S. Gay Street, 8th Floor
Baltimore, Maryland 21202

-and-

John M. Singleton, Esq. – Counsel for Petitioner
WILLIG, WILLIAMS, DAVIDSON & SINGLETON, LLC
400 Redland Court, Ste. 107
Owings Mills, Maryland 21117

Additionally, in accordance with the service requirements of Section 102.114(i) of the Board's Rules and Regulations, a copy of the foregoing was served by electronic mail (e-mail) on John M. Singleton, Esq., Counsel for Petitioner, by sending a copy to the following e-mail address of record: *jsingleton@wwdslaw.com*.

/s/ Gil A. Abramson _____
Gil A. Abramson



United States Government

NATIONAL LABOR RELATIONS BOARD

Region 5

103 South Gay Street, 8th Floor Telephone:

(410) 962-2822

Baltimore, MD 21202-4061

Facsimile:

(410) 962-2198

June 9, 2010

James Strouse, Esq.
Strouse Legal Services
5401 Twin Knolls Rd., Suite 7
Columbia, MD 21045

Re: BWI Taxi Management
Case 5-CA-35693

Dear Mr. Strouse:

The Region has carefully investigated and considered your charge against BWI Taxi Management alleging violations under Section 8 of the National Labor Relations Act.

Decision to Dismiss: Based on that investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charge for the following reasons:

Your charge alleges that the Employer violated Section 8(a)(1) and (3) of the Act by promulgating and maintaining a rule to discourage employees from forming, joining or assisting an association of taxicab drivers and that Mr. Muhammad Ali was discharged because he engaged in protected concerted activities and/or union activities.

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The investigation revealed that there are three categories of taxicab drivers employed by the Employer at the BWI Airport: (1) Lease or ATM Drivers; (2) Owner-Operators; and (3) 2nd Drivers. Although there is some evidence to support your argument that the taxicab drivers in classifications (1) and (2) are employees under the Act, the preponderance of the evidence reveals drivers in classifications (1) and (2) are independent contractors and not employees within the meaning of the Act. Some of the evidence supporting this conclusion is the fact that these drivers are charged a set, flat rental or stand fee for operating their vehicles, select the hours they wish to work within a 12 hour period, and are allowed to subcontract their work with limited restrictions. These factors establish a strong inference of independent contractor status, a conclusion that is not overcome by the Employer's maintenance and application of a disciplinary regime. See *Metro Taxicab Co.*, 344 NLRB 528 (2005). Therefore, the alleged illegal work rule would not be illegal as it relates to those employed as Lease or ATM drivers and Owner-Operators since they are independent contractors.

The evidence concerning the status of drivers in the third classification (2nd drivers), the classification in which Mr. Ali is included, is not substantial enough to demonstrate that employees in his classification, 2nd Drivers, are employees within the meaning of the Act. Nor

EXHIBIT

A

does it appear the alleged illegal work rule was made known by the Employer to individuals employed on the 2nd driver classification, including to Mr. Ali.

Concerning the discharge of 2nd Driver, Mr. Ali, assuming he was an employee under the Act, the Employer has met its burden under *Wright Line*, 251 NLRB 1083 (1980). In particular, it appears the dismissal of Mr. Ali was a result of his misconduct in dealing with a customer. The investigation revealed that he had other infractions of this nature prior to his engaging in any protected concerted activity or union activity, and that the conduct he engaged in was egregious. In sum, I am refusing to issue complaint regarding all allegations pertaining to Mr. Ali and the work rule.

Your Right to Appeal: The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, you are encouraged to submit a complete statement setting forth the facts and reasons why you believe that the decision to dismiss your charge was incorrect.

Means of Filing: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlr.gov, click on **E-GOV**, select **E-Filing**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.

Appeal Due Date and Time: The appeal is due on **June 23, 2010**. If you file the appeal electronically, it will be considered timely filed if the transmission of the entire document through the Agency's website is accomplished **no later than 11:59 p.m. Eastern Time** on the due date. If you mail the appeal or send it by a delivery service, it must be received by the General Counsel in Washington, D.C. by the close of business at **5:00 p.m. Eastern Time** or be postmarked or given to the delivery service no later than **June 22, 2010**.

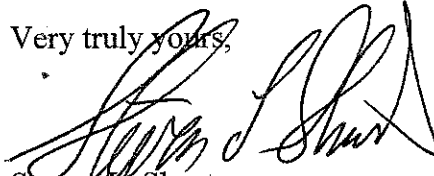
Extension of Time to File Appeal: Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlr.gov, click on **E-Gov**, select **E-Filing**, and follow the detailed instructions. The fax number is (202) 273-4283. A request for an extension of time to file an appeal **must be received on or before the original appeal due date**. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality/Privilege: Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we

may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential source, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(d), 5 U.S.C. § 552(b)(4), (6), (7)(C), and (7)(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Notice to Other Parties of Appeal: You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,



Steven L. Shuster
Acting Regional Director

Enclosures: Form NLRB-4767, Appeal Form

CERTIFIED MAIL 7010 0290 0000 2174 4349

cc: General Counsel
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